IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 363 OF 2007

IN

CRIMINAL APPEAL NO.338 OF 2003

Mr. Rajendra Yashwant Kadam .... Applicant

Vs.

The State of Maharashtra .... Respondent

Mr. A.P. Mundargi, Sr. Advocate with Mr. K.S. Patil for Applicant.

Dr. F.R. Shaikh, APP for Respondent.

CORAM : R.M.S. KHANDEPARKAR, &
A.A. SAYED, JJ.
DATE : 4TH DECEMBER, 2007

ORAL ORDER (PER R.M.S. KHANDEPARKAR, J.)

1) Heard the learned Advocate for the Applicant and the learned APP.

2) The applicant has filed this application under Section 391 of Cr.P.C. seeking leave to examine Dr. Hardas, Head of Psychiatric Department, J.J.Hospital,Mumbai as defence witness.

3) The learned Senior Counsel appearing on behalf of the Applicant, taking us through the records, submitted that the applicant has raised plea of insanity and testimony of Dr. (Miss)

Vanshree Patil clearly reveals that the applicant was examined by a team of Doctors at J.J. Hospital and he was found suffering from chronic paranoid psychosis. In these circumstances, efforts were made by the applicant to examine Dr. Sudarshan, who had issued certificate to the applicant regarding his illness, pursuant to the medical treatment in the J.J. Hospital on account of said illness for a period of three months. The applicant was referred to the said Hospital for medical check up and consequent to the said check-up, he was required to be an indoor patient for about three months. He has also drawn our attention to Exhibit-44 which comprises of the medical reports for the period the applicant was in J.J. Hospital. It is the contention on behalf of the applicant that inspite of such materials being available on record, the same has been refused to be looked into by the learned Sessions Judge while convicting the applicant, solely on the ground that the author of the Certificate has not been examined. It is the contention of the applicant that Dr. Sudarshan was neither available at the relevant time when the matter was for trial nor he was available even today for being examined as a witness and that, therefore, one of the Doctors from the same Department namely Dr. (Miss) Patil who was conversant with the handwriting and

signatures of the concerned doctor, was examined. He has also drawn our attention to the fact that the said witness was thoroughly cross-examined even in relation to the plea of insanity raised on behalf of the applicant. He further submitted that in the interest of justice, it would be appropriate to allow the applicant to examine Dr. Hardas who was a member of the team of Doctors which had examined the applicant while he was under treatment in the J.J. Hospital as he would be able to confirm the medical report regarding the applicant, viz. Exhibit-44, which is totally discarded by the learned Sessions Judge.

4) The learned APP, on the other hand, submitted that the impugned order apparently discloses absence of any justification for non-examination of the concerned Doctor at the trial stage. Undisputedly, Dr. Hardas was one of the Doctors who had examined the applicant while he was under treatment in the Hospital and the application for examination for Dr. Hardas could have been very well made by the applicant during the trial. There is no justification to allow the applicant to examine Dr. Hardas at this stage.

5) Section 391 of the Cr.P.C. undoubtedly empowers the Appellate Court to allow the parties

to lead further evidence in case such evidence is found necessary for appropriate decision in the matter. The Sub-Section 2 thereof provides that in dealing with any appeal under Chapter 29 of Cr.P.C.,. the Appellate Court if it thinks fit additional evidence to be necessary, shall record its reasons and may either take such evidence itself or direct it to be taken by a Magistrate.

6) The provision of law under Section 391 obviously discloses that the decision by the Appellate Court in allowing the evidence has to be exercised in a case where such additional evidence is necessary for an appropriate decision in the matter. It could be a decision on the entire case of the parties to the proceedings or even it can be on any particular issue involved in the matter. However, before allowing to lead such evidence, such necessity thereof has to be established by the party seeking to produce such evidence. Such necessity would imply even the cause for non production thereof prior to the stage at which it is sought to be produced, provided that such non production at the relevant time must be for sufficient and satisfactory reasons.

7) In the case in hand, the sole ground on which Dr. Hardas is sought to be examined after

completion of trial and before pronouncement of the judgment by the trial Court is that the Trial court has rejected the medical report on the ground that the author of the report has not been examined and secondly, that in case the said report is considered, the analysis of the evidence and the finding to be arrived at based thereon in relation to the plea of insanity would be different than the one arrived at by the Trial court. Certainly if the applicant is able to make out his case on the basis of materials on record in that regard, there could be justification for this Court to exercise the powers under section 391 Cr.P.C. and to allow the applicant to lead further evidence in the matter as prayed for. However, the records speak to the contrary and do not justify exercise of those powers in the case in hand.

8) The impugned judgment itself discloses that the evidence on record reveals that Dr. Hardas, alongwith five other Doctors, was a member of the Committee headed by Dr. Sudarshan who had examined the applicant. In other words, apart from Dr. Sudarshan, six other Doctors were the members of the Committee which had examined the applicant and later could have examined any one of them during the course of the trial while leading the defence evidence. There is no explanation forthcoming as

regards the failure on the part of the Applicant to examine any of those Doctors before the conclusion of the trial.

9) It is pertinent to note that the reports disclose that an attempt was made on behalf of the applicant to summon Dr. Hardas to examine him during the trial of the case and that is apparent from Exhibit 38 which was filed on 29th January 2002. In fact, the said application was allowed by the trial Court and even summons was issued to Dr. Hardas and was handed over to the Advocate for the applicant for service thereof upon Dr. Hardas at J.J. Hospital. However, the entry in Roznama on 1st February 2002 reads thus :

> "Summons was issued to Dr. Hardas and it was given to the defence counsel for service, which has been returned to the Court without service...".

The records nowhere disclose why the summons to Dr. Hardas was not served upon him and why no efforts were made to secure his presence before the trial Court knowing well that he was one of the members of the Committee which had examined the applicant and considering the plea of insanity raised in the matter, the burden was squarely upon the applicant

to establish the said plea.

10) It is also pertinent to note that Dr. (Miss) Vanshree Patil was examined as DW-2 on 12th February 2002. She had appeared before the Trial Court pursuant to the summons issued at the instance of the applicant. The Exhibit-42 before the Trial Court clearly discloses an application by the applicant for summons to Dr. (Miss) Vanshree Patil for her examination as the defence witness and production of the case papers in relation to his treatment.

11) Testimony of Dr. Ms. Vanshree Patil clearly reveals that she had not examined the applicant, but she was conversant with the handwriting and signature of Dr. Sudarshan, and in fact, she has identified the same on Exhibit 44.

12) Knowing well the burden which was upon the applicant to prove his plea of insanity, it was the applicant who was required to establish the contents of Exhibit 44 by examining one of the doctors who had examined him. It was known to the applicant and there was enough opportunity available to him to examine any one member of the committee of 7 Doctors. Even though the summons was obtained for Dr. Hardas, the same was not even

served upon him. No attempts were made before the trial Court to get fresh summons for Dr. Hardas.

No explanation is forthcoming in that regard.

13) For the reasons stated above, therefore, we do not find any case having been made out for exercise of powers under section 391 of Cr.P.C. to allow the applicant to examine Dr. Hardas at this stage. In fact, to allow the said application at this stage would virtually amount to arbitrary exercise of powers and it would result in allowing the applicant to fill up the lacunae in the evidence. The powers under Section 391 of Cr.P.C. can not be exercised to allow the parties to the proceedings to fill the lacunae in the evidence.

14) For the aforesaid reasons, the application is liable to be dismissed and is accordingly hereby dismissed.

(R.M.S. KHANDEPARKAR, J.)

(A.A. SAYED, J.)